ISSN: 1858-2338

JURNAL HUKUM HUMANITER

Vol. 4 No. 7 OKTOBER 2008

ARTIKEL UTAMA

ARTIKEL PENDUKUNG

KOLOM

Diterbitkan oleh:
PUSAT STUDI HUKUM HUMANITER DAN HAM (terAs)
FAKULTAS HUKUM UNIVERSITAS TRISAKTI

Diterbitkan atas kerjasama dengan FRR Law Office

JURNAL HUKUM HUMANITER

Diterbitkan oleh Pusat Studi Hukum Humaniter dan HAM (terAs)
Fakultas Hukum Universitas Trisakti Jakarta

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Jurnal Hukum Humaniter terbit setiap enam bulan pada bulan April dan Oktober

EDITORIAL

Segala puji dan rasa syukur hanya kami panjatkan ke hadirat Allah Ta'ala sehingga atas perkenanNYA jualah maka JURNAL HUKUM HUMANITER ini dapat hadir kembali di tangan para pembaca.

Pembaca yang budiman,

JURNAL HUKUM HUMANITER edisi ke tujuh ini menyajikan beberapa artikel utama, yang membahas salah satu topik dalam hukum humaniter, yaitu bagaimana peranan seorang perwira hukum dalam suatu sengketa bersenjata khususnya menjelang perencanaan maupun persiapan operasi-operasi militer. Dibahas pula mengenai kejahatan yang dilakukan dalam peperangan di laut, yang menguji kembali berlakunya asas-asas hukum humaniter dalam sengketa bersenjata internasional. Di samping itu, diketengahkan juga tulisan yang masih berkaitan dengan masalah privatisasi jasa militer pada edisi sebelumnya, namun kali ini khususnya yang dilakukan oleh *Private Military Company Blackwater* Amerika Serikat di Irak. Masalah pelanggaran-pelanggaran hukum humaniter juga dibahas dalam edisi ini, khususnya perlakuan dari tentara Amerika Serikat kepada tawanan perang Irak di Penjara Abu Ghraib. Sebagai artikel pendukung, Redaksi memilih artikel yang membahas mengenai prinsip tanggung-jawab pidana individu yang berkaitan dengan kejahatan internasional seperti kejahatan perang.

Adapun mengenai isi "Kolom" kali ini memuat laporan perkembangan terbaru dari Mahkamah Pidana Internasional, yang terutama menyoroti aspek-aspek hukum acara dalam Kamar-kamar Peradilan Mahkamah Pidana Internasional (ICC).

Sedangkan untuk terjemahan perjanjian internasional di bidang hukum humaniter, disajikan terjemahan Konvensi Den Haag V tahun 1907 mengenai Hak-hak dan Kewajiban-kewajiban Negara Netral dan Orang-orang Netral dalam Perang di Darat.

Penerbitan JURNAL HUKUM HUMANITER untuk edisi Oktober 2008 ini terwujud berkat kerjasama dengan FRR Law Office, yang telah berkomitmen dalam rangka mengembangkan hukum humaniter di Indonesia. Akhirnya kami mengharapkan tulisan-tulisan ilmiah dari berbagai kalangan masyarakat pemerhati hukum humaniter, dan juga masukan dari pembaca berupa kritik maupun saran konstruktif bagi perbaikan di masa yang akan datang.

Selamat membaca.

Redaksi

DAFTAR ISI

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

Nobuo Hayashi[1]

Abstract

In discourse of international criminal law, today, individual criminal responsibility is an important principle. This principle will be explained along with other aspects, such as "secondary rules", "actus reus", "mens rea" and also some international crimes under international law, particularly genocide, crimes against humanity, and war crimes. While, the international legal mechanisms, such as ICC and ICTY are also presented in this paper in connection with the implementation of international criminal responsibility.

Key words: individual criminal responsibility, criminal conduct, international criminal law.

This lecture introduces participants to the essential tenets of international criminal law. It examines in detail the sources and nature of criminal prohibition under international law, the types of crimes and the grounds upon which persons—including those in positions of authority and influence—become individually liable.[2]

The lecture will be ideally suited for those seeking to deepen their understanding of international criminal law within the broader context of public international law and general

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[2] With a view to ensuring focus and depth, this lecture concentrates on the substantive aspects of international criminal law. Matters relating to procedure, evidence and the institutional framework of international criminal justice—important though they clearly are—will not be discussed in detail.

criminal law. Participants are strongly advised, but not required, to have already taken one or more of the following courses: public international law, international human rights law, international humanitarian law and general criminal law.

A. Introduction

The expression "international criminal law" encompasses a wide range of prohibited conduct to which international law attaches individual criminal responsibility. There are considerable substantive overlaps between (a) acts in breach of international humanitarian law, (b) acts in breach of international human rights law and (c) acts punishable under international criminal law.

Conduct designated as criminal under international law remains so whether or not it is also designated as criminal under any domestic law. The principle of *non bis in idem*—according to which a person must not be tried twice for the same conduct—does not preclude a person from being tried first for an ordinary, domestic crime and then for an international crime where the two crimes consist of the same conduct.[3] This is particularly true of war crimes, crimes against humanity and genocide.

As is the case in other areas of international law, rules of international criminal law are made by States. Their primary addressees are individuals, however. States are mainly responsible for suppressing international crimes within their respective spheres of authority and ensuring mutual co-operation in accordance with applicable rules.

[3] Once a person has been tried for an international crime, however, he or she may not subsequently be tried for another crime in respect of the same act.

B. Criminal Conduct

Not every violation of law constitutes a criminal offence. Only a limited number of violations are subject to criminal sanctions. Numerous violations merely attract disciplinary, administrative or similar non-criminal sanctions, while others envisage no legal sanctions at all. Breaches of a rule are crimes only if a separate set of rules—frequently described as "secondary rules" or "rules about rules"—designate them as crimes.[4] Where these "secondary rules" designate a particular breach as a crime, this designation indicates that the breach causes grave harm, that it injures not just individual victims but also society as a whole, that it exposes the responsible party to severe punishment and that it deserves condemnation and moral stigmatisation.

International law contains rules, including "secondary rules," which are conventional or customary in character. It follows that there are four combinations of sources for crimes under international law:

1. Breaches of a conventional rule giving rise to conventional crimes;[5]
2. Breaches of a conventional rule giving rise to customary crimes;[6]
3. Breaches of a customary rule giving rise to conventional crimes;[7] and

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[4] In domestic jurisdictions, "secondary rules" include the criminal code and penal provisions attached to statutes. For instance, enactments on traffic and securities transactions usually contain provisions specifying certain serious breaches, such as speeding at 40 km/h or over and insider trading, as criminal offences.

[5] Examples include acts prohibited in Article 12 and criminalised in Article 15(1) of the 1999 Second Protocol to the 1954 Hague Cultural Property Convention.

[6] Examples include unlawfully spreading terror among the civilian population, an act prohibited under Article 51(2) of the 1977 First Additional Protocol/Article 13(2) of the 1977 Second Additional Protocol and found to constitute a customary war crime by a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Galić* case.

4. Breaches of a customary rule giving rise to customary crimes.[8]

International law experts routinely disagree on the precise content of customary rules and/or the exact moment at which they come into existence. Some acts may be in breach of customary rules only and designated as customary crimes only. According to commentators, crimes of this nature might risk infringing upon the principle of *nullum crimen sine lege* and the prohibition of retroactive application in particular.

Criminal conduct is distinct from "modes of liability," the legal bases upon which persons are held individually liable for it. A crime is committed when the facts satisfying its material/objective element ("*actus reus*," as it is known in common law jurisdictions) and the facts satisfying its mental/subjective element (similarly, "*mens rea*") are both present. Where a crime has been committed, a person becomes liable for that crime if, for instance, his or her conduct and mental state fulfil the requirements for aiding and abetting in its commission.

There are several categories of crimes under international law. Examples include war crimes, crimes against humanity, genocide and aggression, as well as other conduct designated as crimes in customary international law (*e.g.* piracy) and by multilateral treaties (*e.g.* narcotics trafficking, certain acts of terrorism). Of interest here are war crimes, crimes against humanity and genocide.

War crimes are one of the oldest categories of international crimes. All war crimes require the showing that they

[7] Examples include pillaging a town or place in non-international armed conflict, arguably prohibited under customary international humanitarian law and criminalised in Article 8(2)(e)(v) of the ICC Statute.

[8] Examples include unlawful attacks on civilian objects in non-international armed conflict.

were committed in an armed conflict, that they were closely linked to it and that the victims were protected against them under international humanitarian law. Consequently, certain conduct may constitute war crimes if committed against one class of persons but not if committed against another. Nor do all crimes committed in armed conflict necessarily constitute war crimes. Some war crimes can only be committed in international armed conflicts.

Crimes against humanity date back to the 1945 Nuremberg Charter. They were introduced primarily to punish State officials who had grossly mistreated their own nationals and de-nationalised persons. Elements common to crimes against humanity include the existence of a widespread or systematic attack against a civilian population, a nexus between the crimes and the attack, and the former being committed with the awareness of the latter. Unlike war crimes, crimes against humanity may be committed in war or in peace.

Initially, genocide was a species of crimes against humanity. Today, it is commonly regarded as one of the most serious crimes under international law. Genocide also constitutes a prohibition having the character of *jus cogens*. In order for given conduct to amount to genocide, it must be accompanied by intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Whether genocide requires a certain minimum number of perpetrators and/or victims is a matter of dispute.

War crimes, crimes against humanity and genocide injure a wide range of protected interests, such as:

1. Life and limb—torture, mutilation, sexual and mental abuse, biological experiment, unlawful homicide or injury, inhumane treatment, *etc.*;
2. Rights and freedoms—denial of fair trial rights and judicial remedies, unlawful deprivation of liberty, forced displace-

ment, enslavement, hostage-taking, use as human shield, forced participation in military operations, unlawful forced labour, underage conscription or enlistment, *etc.*;
3. Objects—destruction, damage, attacks, plunder, *etc.*; and
4. Protocols of combat—denial of quarter, use of prohibited weapons and materials, starvation as a method of warfare, perfidy and improper use of protected symbols, *etc.*

Where all relevant elements are satisfied, particular conduct may simultaneously constitute a war crime, a crime against humanity and an act of genocide.

C. Individual Criminal Responsibility

Historically, international law treated most of its violations as a matter of State responsibility.[9] While criminal trials did take place, they were limited in number and significance. It is only during the past 90 years or so that punishing individuals for international crimes has become a more serious and credible idea.

Individual criminal responsibility for international crimes may arise alongside other types of responsibility under international law. For example, had the International Criminal Court (ICC) been established in the early 1990s and had jurisdiction over Bosnia and Herzegovina, one would have seen the following:
1. The ICC trying individuals charged with war crimes, crimes against humanity and genocide;
2. The ICC ordering convicted persons to make reparations to victims;[10] and

[9] The crimes of piracy and slavery are notable exceptions in this regard.
[10] See, *e.g.*, Article 75(2), ICC Statute.

3. The International Court of Justice adjudicating claims by Bosnia and Herzegovina against Serbia for violations of international humanitarian law.[11]

International law provides for a number of "modes of liability" under which individuals become liable for international crimes. Examples include: committing; ordering; instigating, soliciting or inducing; aiding, abetting or assisting; contributing via a common purpose or joint enterprise; directly and publicly inciting[12]; attempting[13]; and failing to prevent subordinates from committing or to punish them for having committed.

Committing war crimes, crimes against humanity and genocide often involves high degrees of organisation and co-ordination. The various elements of an international crime may be satisfied in different parts by numerous persons separated in time and space. Thus, the person who physically performs the material element of the crime may not possess the requisite intent. Conversely, the person who possesses the requisite intent may be hundreds of miles away from the crime scene.

When pursuing high-level masterminds of large-scale atrocities, international prosecutors have relied heavily on two "modes of liability." One is the doctrine of command or superior responsibility. This is a doctrine of international law whereby a person in authority may be held criminally responsible for acts committed by subordinates because of his or her failure to prevent them from committing such acts or to punish them once such acts have been committed. For a person to be held liable under this doctrine, he or she must

[11] Also, see Article 25(4), ICC Statute.
[12] This mode of liability applies exclusively to the crime of genocide.
[13] This mode of liability is subject to abandonment.

have had effective control over subordinate perpetrators at the relevant time. In addition, it must be shown that he or she knew or "had reason to know" that the crimes were committed or about to be committed.[14] Moreover, he or she must be shown to have failed to take the necessary and reasonable preventative or punitive measures. As the doctrine stands today, it holds commanders and superiors liable only for the crimes which their subordinates "commit," *i.e.*, where the subordinates possess the requisite intent themselves.

The other mode is known as "common criminal purpose" or "joint criminal enterprise." Under certain circumstances, a person may become liable for crimes committed by persons acting in concert and with a common purpose. This liability is engaged where the person in question contributes to the commission of the crime and, in so doing, intends to further or is aware of the group's activity or purpose involving the crime's commission. The doctrine has evolved significantly since the late 1990s. There is a common perception that this doctrine implies greater culpability and is more flexible in its application and less arduous to prove than command responsibility. In 2004, however, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Brđanin* case that the doctrine does not apply where the group's criminal purpose is not shared by those who physically perform the material element of the crime. In *Krajišnik*, another ICTY Trial Chamber refused to apply the doctrine to crimes whose commission was foreseeable but not intended.

In contemporary international law, individual criminal responsibility for most international crimes attaches equally to

[14] Positions differ as to whether "should have known" is the standard applicable to military commanders and "conscious disregard of clearly indicative information" to civilian superiors. See, *e.g.*, Article 28, ICC Statute.

any person. It does so whatever official capacity the person may have, be it that of a Head of State or diplomatic agent.[15]

Where a rule envisages an exemption, and where the rule's violation constitutes a crime, the absence of circumstances satisfying the exemption's requirements is an element of that crime. For instance, when a person is charged with a war crime of which the absence of military necessity is an element—*e.g.*, property destruction—, and when that person pleads military necessity, he or she challenges the notion that the crime was committed at all.

Should every element of a crime be proved by the prosecution, an accused person might still try to justify his or her conduct (thereby excluding wrongfulness) or excuse him- or herself (thereby excluding or reducing blameworthiness). Self-defence is a typical justification. Excuses include duress, insanity, mistake of law, mistake of fact and, more controversially, superior orders.

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[15] It does not necessarily follow however that any court has jurisdiction to try any person for international crimes. This concerns the hotly debated issue of immunity from criminal proceedings.

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